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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 326

PATRICK J. REILLY, JR.,

Petitioner,

vs.

HELEN D. REILLY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH BRIEF IN SUPPORT THEREOF.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petitioner, Patrick J. Reilly, Jr., respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to remove therefrom for review here the record in Case No. 10,332, wherein petitioner is the appellant and the respondent is appellee, and in which case the Court announced its decision under date April 24, 1950 affirming the

judgment of the United States District Court for the District of Columbia Circuit.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13, 1925.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia Circuit announced on April 24, 1950.

Summary Statement of Matter Involved

This is a divorce case in which the respondent wife sought a divorce a mensa et thoro from her husband, alleging that his cruelty to her was sufficient to grant such decree under the relevant statute of the District of Columbia Code. The trial court granted respondent wife the requested limited divorce and over objection of petitioner said court proceeded to partition or to divide between the parties all property acquired by them incident to their marriage in a manner which it deemed equitable and just.

The trial court overruled present petitioner's objection to such property settlement on the ground that Rule 18(a), of the Federal Rules of Civil Procedure, permitted such action to be taken under the complaint for a limited divorce, which also set forth a prayer for general relief. Rule 18(a) provides:

> "Joinder of Claims. The plaintiff in his complaint * * * may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party * * *".

Petitioner brought this case on for review in the United States Court of Appeals for the District of Columbia, rais-

ing both the point that there was not sufficient evidence of cruelty presented in the court below to sustain the divorce, and further, that even assuming such divorce a mensa et thoro was properly granted, that the court was without power to partition the real and personal property of Mr. and Mrs. Reilly. On April 24, 1950, that court sustained the order of the court below in both respects.

Questions Presented

Whether under Rule 18(a) of the Federal Rules of Civil Procedure, the trial court, in granting a divorce by virtue of the local federal statute, may also divide properties between the parties, which might have been acquired incident to their marriage.

Whether the evidence was sufficient to justify a decree of limited divorce.

Reasons Relied upon for Allowance of Writ of Certiorari

This case will require an interpretation of the relationship between federal statutes and the common law, as over and against the Federal Rules of Civil Procedure. Said Rules of Civil Procedure are relatively new and this Court should be well disposed towards an opportunity to clarify all situations in which conflict of their application has been noticed. The point here involved, although referring to a local action and local statutes, is actually of great interest in all jurisdictions. The situation in this case would seem to grant to the new Rules a substantive character which the petitioner feels was not intended. They are for the guidance of procedure and involve adjective law only.

The District Court, in awarding a decree of limited divorce on the state of the evidence, and the action of the

Court of Appeals in affirming the decision of District Court, represents such a departure from the ordinary and accepted course of judicial procedure as to call for this Court's power of supervision.

JAMES J. LAUGHLIN,
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Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended by Act of February 13, 1925.

Statement of the Case

Petitioner and respondent were married in July, 1941, in Fairfax County, Virginia. Except for an interval of approximately three weeks in January, 1947, they continuously lived and cohabited together until the month of June, 1948, whereupon suit was filed by the respondent wife in the lower court for a divorce from the petitioner husband on the ground of cruelty. Trial of the case, on the issue of cruelty, was had in April, 1949, and a decree was rendered award-

ing a divorce a mensa et thoro to the respondent on said ground. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the judgment of District Court, announcing its decision on April 24, 1950.

Argument

1. It is the contention of the petitioner that the Federal Rules of Civil Procedure were not intended to alter in any fashion the common or statutory law prevailing in any of our jurisdictions. Even in the enabling act of June 19, 1934, Ch. 651, Congress restrictively states: "Federal rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." 48 Stat. 1064, U. S. Code, Title 28, Sec. 723(b) and 723(c). As applied in this case the Federal Rules of Civil Procedure have been used to support the Court's action in dividing property between husband and wife while granting a divorce on the ground of cruelty, under our local statute. The division of property, whether real or personal, and even though acquired by either spouse during and incident to the marriage, was never recognized at common law as to be within the power of the divorce court.

Dougherty v. *Dougherty,* 187 Md. 21, 48 At. (2d) 451;
Lickle v. *Boone,* 187 Md. 579, 51 At. (2d) 162, 170 A. L. R. 156;
Ring v. *Ring,* 185 Va. 269, 38 S. E. (2d) 471, 165 A. L. R. 1237;
Commerford v. *Commerford,* 54 N. W. Sup. (2d) 563;
Cooley v. *Cooley,* 320 Mich. 209, 30 N. W. (2d) 840;
Waltrick v. *Waltrick,* 169 Md. 705, 182 At. 339;
Budai v. *Budai,* 38 Ohio App. 79, 175 N. E. 624;
Hutson v. *Hutson,* 204 Minn. 601, 284 N. W. 780.

Any authority which the Court might have over the property rights of the spouses in a divorce proceeding

must therefore be exercised within the limits prescribed by the many statutes which have been passed in the various states concerning this point.

Hall v. *Hall,* 180 Md. 353, 24 At. (2d) 415;
Luczynski v. *Luczynski,* 327 Ill. App. 548, 64 N. E. (2d) 385;
Dunn v. *Dunn,* 308 Ky. 148, 213 S. W. (2d) 1011.

The District of Columbia has had such statute for many years. Section 16-409, Title 16, D. C. Code, 1940 Edition, reads as follows:

> "Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just, and reasonable."

By virtue of this statute the equity term of court could administer to certain property interests between the spouses as an incident to the granting of certain types of divorces. It was in derogation of the common law and was intended to be applied no further than its clear terms express. Property rights between husband and wife, other than those referred to in the above statute, have never been involuntarily settled by our courts, and it is difficult to see how the Federal Civil Rules providing for a combination of actions in one proceeding could change such law of substance.

It might well be that a husband or wife would have a claim to the other's property acquired during marriage on the basis of some of the well recognized heads of equity juris-

prudence, and that in such case the cause could be joined with one of divorce. Petitioner simply feels that unless the respondent's right to demand her interest in his property and a partition thereof is such as could be sustained in a separate legal or equitable action, that it cannot be recognized in the divorce proceeding even under Rule 18(a), Federal Rules of Civil Procedure, on which the court below has relied.

2. The trial court granted a decree of limited divorce on the ground of cruelty. The decision of the trial court was upheld by the Court of Appeals. We well realize that under ordinary circumstances this Court is not concerned with questions of purely local law and procedure. However we believe that if this decision is permitted to stand the provisions of the law relating to divorce on the ground of cruelty are left to the whim of an individual judge. The sum total of the evidence below consisted in the wife's allegation that the husband had been drinking, although she admitted that it did not interfere with his day to day employment in the Government. She admitted that she, herself used liquor in moderation. The major point stressed by the respondent was the fact that the petitioner did not afford her the proper companionship. As a matter of fact, an examination of the record will show that the grounds upon which the court acted are wholly lacking in substance. If the decision below is permitted to stand, then the District of Columbia will take its place along side those jurisdictions permitting easy divorce. Surely this was not the intent of the Congress.

We call attention to the rule laid down by the Court of Appeals in the case of *Waltenberg* v. *Waltenberg,* 54 U. S. App. D. C. 383. The reasoning in this case was disregarded in the *Reilly* case. We believe that this is a correct statement of the law and should not be departed from.

Conclusion

In view of what has been said we believe that petition for writ of certiorari should be granted.

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